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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 694

KENNETH M. WAITE, PETITIONER

v.

J. ELLIS OVERLADE, WARDEN,
UNITED STATES PENITENTIARY,
TERRE HAUTE, INDIANA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 97–101) is reported at 164 F. 2d 722. The findings of fact and conclusions of law of the district court (R. 67–73) are not reported.

JURISDICTION

The judgment of the circuit court of appeals was entered December 19, 1947 (R. 101–102). A petition for rehearing was denied January 10, 1948 (R. 102). The petition for a writ of certiorari was filed March 25, 1948. The jurisdiction

of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether, where the record shows substantial compliance with the investigatory procedure required by Article of War 70, irregularities in the pre-trial procedure will permit collateral attack by way of habeas corpus on a conviction by court-martial.

2. Whether a habeas corpus court may inquire into the sufficiency of the evidence to support a conviction by court-martial.

3. Whether petitioner's trial by court-martial was fair.

4. Whether respondent was required affirmatively to show the authority of the officer convening the court-martial where petitioner made no showing of the lack of such authority.

STATUTE INVOLVED

The 70th Article of War, as amended (10 U. S. C. 1542), provides in pertinent part as follows:

> No charge will be referred to a general court martial for trial until after a thorough and impartial investigation thereof shall have been made. This investigation will include inquiries as to the truth of the matter set forth in said charges, form of charges, and what disposition of the case should be made in the interest of

justice and discipline. At such investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf either in defense or mitigation, and the investigating officer shall examine available witnesses requested by the accused. If the charges are forwarded after such investigation, they shall be accompanied by a statement of the substance of the testimony taken on both sides.

Before directing the trial of any charge by general court martial the appointing authority will refer it to his staff judge advocate for consideration and advice.

STATEMENT

In August 1943, petitioner, a private in the Army, was tried by court-martial on a charge of rape in violation of the 92d Article of War, 10 U. S. C. 1564 (CM 107–109).[1] The record of the trial shows that the only disputed issue was whether complaining witness was subjected to force as she testified (CM 113–115), or whether she consented, as petitioner claimed, in preliminary statements to investigating officers (CM 57, 60), and at the trial (CM 204). The charge of force was corroborated by testimony that the

[1] A record of petitioner's trial by court-martial was introduced in evidence as Exhibit A (R. 41). References to that record are designated by "CM" and the page references are to the numbers in the lower left-hand corner followed by the initials "E. W."

complaining witness sought the aid of an R. A. F. guard immediately after she ran away from petitioner (CM 161, 164), and by evidence of her physical condition when she was examined at the police station to which she was taken that evening (CM 128–130).

Petitioner was found guilty and sentenced to imprisonment for life, the minimum sentence required by AW 92 (CM 230). Thereafter, the members of the court-martial recommended clemency, expressing the opinion that the incident would not have happened except for encouragement given by the complaining witness during preceding weeks (CM 242). The reviewing authority approved the sentence, but reduced the period of confinement to 20 years (CM 9). The record of the trial was reviewed pursuant to AW 50½ (10 U. S. C. 1522) and held legally sufficient (CM 3–8). Petitioner's sentence was subsequently reduced to 15 and then to 10 years (R. 98, n. 2).

In September 1946, petitioner, who was confined in the United States Penitentiary at Terre Haute, Indiana, filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of Indiana, attacking the validity of his conviction. He alleged that the court-martial had been illegally invoked, that the investigatory procedure prescribed by AW 70 had not been followed, and that he had been inadequately represented by defense counsel (R.

2–5). The writ issued, and a hearing was held at which petitioner testified (R. 26–27) and at which the record of the court-martial was introduced in evidence (Ex. A, R. 41).

Petitioner testified that, when he was interviewed on the charges, he was told that he would not be allowed to talk to witnesses (R. 37). The record of the court-martial contains a report of the preliminary investigation (CM 24–81), including the statement made by petitioner to the investigating officer (CM 57–58). The record of that interview shows that petitioner stated that he would like to talk with the complaining witness, and that he was told that he could see her only in the presence of the civil police and witnesses, that it was against the rules of British law to have an interview under any other circumstances. He replied, "I do not wish to see her then" (CM 58). The record also shows that petitioner was shown the statements of a number of witnesses, and that he stated that he did not wish to question them (CM 58).

Petitioner also testified that his defense counsel did not participate in the trial, that he did not see assistant defense counsel until the day before the trial, and that the assistant defense counsel did not properly cross-examine witness (R. 28, 32–35). The court-martial record shows affirmatively that petitioner's chief defense counsel had interviewed one witness (CM 217), and that another witness was called for the defense

(CM 196). It also shows that petitioner stated that defense counsel had explained to him his rights about making a statement and taking the stand (CM 202). The record also shows that assistant defense counsel acted as trial counsel, and took an active part in the trial, making frequent objections to questions (e. g. CM 116–121, 162, 172).

The district judge found that petitioner's trial "was in all respects conducted in the manner and form and in compliance with the Articles of War" and that "the rights and defense of petitioner were actively asserted" (R. 72). He concluded that petitioner was lawfully in custody and ordered that the writ of habeas corpus be discharged (R. 73).

On appeal the judgment of the district court was affirmed (R. 101–102).

ARGUMENT

1. Petitioner contends (Pet. 11–12, 13, 14–17; Br. 7, 12–14, 15–17) that the pretrial investigatory procedure prescribed by AW 70 was not followed, and that such noncompliance served to deprive the court-martial of jurisdiction to try petitioner. The record plainly shows, however, that there was substantial compliance with the provisions of AW 70. It is clear from the record of petitioner's interview with the investigatory officer (CM 57–58) that he was informed of the nature of the accusation against him. He was

asked whether he desired to see the complaining witness and, although he at first said he wished to see her, he changed his mind when he learned that witnesses to such an interview would be required under British law (CM 58). AW 70 provides for cross-examination of witnesses by the accused "if they are available," and obviously British civilian witnesses would be available only under conditions permitted by British law. Significantly, as to all American witnesses, except the doctor who made the physical examination, i. e., the witnesses who were available, petitioner was specifically asked if he wished to examine the witnesses and he affirmatively stated that he did not care to do so (CM 58). The circuit court of appeals was therefore clearly correct in stating that (R. 101), "If there was any relaxation of pretrial investigation requirements not waived by appellant (and we are not convinced that there was), it certainly was not of a nature seriously to impair any of his fundamental constitutional rights."[2]

Under these circumstances, it is clear that petitioner has failed to support his contentions that there was such noncompliance with Article of War 70 which would deprive the court-martial

[2] The district court did not make a specific finding as to compliance with AW 70, but its finding, that petitioner's trial was in all respects conducted in compliance with the Articles of War (R. 72), is sufficiently broad to include a finding of compliance with AW 70. In any event, the facts set forth above appear in the court-martial record which is in evidence.

of such jurisdiction. Even if a serious prejudicial defect in the pretrial investigation would be deemed to be a jurisdictional defect, as held by the cases on which petitioner relies (Pet. 15, Br. 15), that question is not present in this case, since substantial compliance was clearly shown. If there was any defect in the investigatory procedure at all, and we submit that there was none, it was a mere irregularity which would in no way affect petitioner's rights. Such an irregularity would no more oust the court-martial of jurisdiction than an irregularity in the impaneling of a grand jury would invalidate a conviction by a civil court. See *Kaizo* v. *Henry,* 211 U. S. 146; *Harlan* v. *McGourin,* 218 U. S. 442, 451; *United States ex rel. McCann* v. *Thompson.* 144 F. 2d 604 (C. C. A. 2), certiorari denied, 323 U. S. 790. Just as the indictment is the prerequisite to criminal proceedings in a federal district court, so the military charges and specifications are the foundation of a prosecution before a court-martial. The cases cited show that one convicted in a district court does not go free because of irregularities in the accusation; as the Second Circuit said (144 F. 2d at 608), "Nothing could more effectively defeat the interests of justice." Similarly, a person convicted after a legal trial before a general court-martial does not escape punishment because of irregularities in the pretrial investigation.

The investigation prescribed by AW 70 is in no sense jurisdictional, as is significantly demonstrated by important differences in the investigating procedure and the trial itself. Thus, while counsel must be appointed for an accused on trial before a general and a special court-martial (AW 11; 10 U. S. C. 1482), and individual counsel may be employed to conduct the defense at the trial (AW 17; 10 U. S. C. 1488; par. 45a, MCM), a person simply under charges is not entitled to counsel at the pretrial investigation. *Romero* v. *Squier,* 133 F. 2d 528 (C. C. A. 9), certiorari denied, 318 U. S. 785. Similarly, while compulsory process is available to secure the attendance of witnesses at a trial by general court-martial (AW 22; 10 U. S. C. 1493), process which is enforcible by prosecution in the civil courts (AW 23; 10 U. S. C. 1494), there is no such facility for obtaining testimony at the pretrial investigation. It would be surprising to suggest that Congress intended to make jurisdictional a preliminary to trial which was left unprovided with any sanctions to compel testimony. Similarly, in England, where the present trial took place, English law provided for the compulsory attendance of civilian witnesses before American courts-martial, but not before American pretrial investigating officers. See 1 Statutory Rules and Orders, 1942, pp. 849–850; cf. United States of America (Visiting Forces) Act, 1942, St. 5 & 6 Geo. VI, c. 31.

The fact of the matter is that, so long as there was an investigation in fact—i. e., so long as the charges were not referred for trial without the intervention of any investigating officer—irregularities in the pretrial investigation have never been considered jurisdictional. Congress did not so consider them when, in 1937, it amended AW 70 to dispense with investigations prior to trial by summary and special courts-martial. Act of August 20, 1937, c. 716, 50 Stat. 724; see H. Rep. 1517, S. Rep. 65, 75th Cong., 1st sess. Those reports are far from suggesting that Congress thought it was eliminating a jurisdictional prerequisite to trials by inferior courts-martial.

And Congress still does not consider the pretrial investigation jurisdictional. See H. Rep. 2722, 79th Cong., 2d sess., p. 3, recommending that AW 70 be amended to make noncompliance therewith a jurisdictional error; H. Rep. 1034, 80th Cong., 1st sess., p. 7, recommending against making noncompliance with AW 70 a jurisdictional defect. Both reports, though their recommendations differ diametrically, join in recognizing that noncompliance is not now a jurisdictional error.

The Judge Advocate General of the Army has repeatedly held that noncompliance with the pertinent provisions of AW 70 does not affect the jurisdiction of a general court-martial. CM

229477 (*Floyd*) 17 B. R. 149, 153; CM ETO 6694 (*Wornock*), 17 B. R. (E. T. O.) 163, 179; CM ETO 4570 (*Hawkins*), 13 B. R. (E. T. O.) 57, 71–75; CM 323486 (*Ruckman*). And other circuits have held that, absent a showing of vitiating unfairness at the actual trial, the provisions of AW 70 are not jurisdictional. *Thompson* v. *Sanford,* 163 F. 2d 830 (C. C. A. 5), certiorari denied, March 15, 1948, No. 163 Misc., this Term; *Exkano* v. *Sanford,* 165 F. 2d 435 (C. C. A. 5), pending on petition for certiorari, No. 374 Misc., this Term.[3] Here there are concurrent findings by two civil courts that the trial was a fair one.

The other cases relied on by petitioner do not establish any conflict. The rationale of the court below is in entire accord with that of the Third Circuit in *United States ex rel. Innes* v. *Hiatt,* 141 F. 2d 664, a case which did not involve AW 70. The present point was not passed on either by the Second Circuit or by this Court in *United States* v. *Bayer,* 156 F. 2d 964, reversed on other grounds, 331 U. S. 532. And *Reilly* v. *Pescor,* 156 F. 2d 632 (C. C. A. 8), certiorari denied 329 U. S. 790, is not

[3] *Hicks* v. *Hiatt,* 64 F. Supp. 238 (M. D. Pa.), apparently to the contrary, is actually dictum throughout. The opinion was filed after the case had become moot by reason of inadvertent discharge of the petitioner. *Anthony* v. *Hunter,* 71 F. Supp. 823 (D. Kan.), also apparently to the contrary, really proceeds on the basis of fundamental and vitiating unfairness at the actual trial. On any other basis, it cannot, in face of the authorities collected above, be supported.

a square holding on the present point, if indeed it rises to the dignity of dictum.

2. Petitioner's contention that the court-martial applied an erroneous standard of guilt in adjudging the crime of rape (Pet. 13–14; Br. 17–20) is merely an attempt to have the habeas corpus court review the sufficiency of the evidence to support his conviction. That manifestly is not a question which may be reached by habeas corpus. *In re Yamashita,* 327 U. S. 1, 7–8, 17, and cases cited; *Grafton* v. *United States,* 206 U. S. 333, 345–348. Moreover, the record shows that the only disputed issue was the question of force, and that there was ample evidence to support the findings of guilty.

3. Petitioner's contention that he was denied a fair trial (Pet. 14, Br. 7) is, as both courts below found (R. 72, 101), wholly without merit. The court-martial record affirmatively shows that he was adequately represented by counsel and that the trial was fair and regular in all respects.

4. Petitioner also contends that the court below erred in failing to require the respondent to show that the court-martial was legally constituted (Pet. 14, Br. 7, 14–15, 21–22). He apparently argues that the legend on the order appointing the court, which reads as follows: "By command of Brig. Gen. Collins, George S. Andrew, Col. G. S. C., C. of S." (CM 101), is insufficient to

constitute a showing that the order was in fact the action of the Brigadier General. But this contention entirely overlooks the circumstance that an order appointing a court-martial is to be authenticated as may be prescribed in Army Regulations (MCM, p. 231), and that the regulations prescribed precisely the form of order here employed. Par. 13, Army Regulations 310–50, Aug. 8, 1942, in force at the time. It is the General's order although signed only by the Chief of Staff. The personal signature of the commander is required only in his action on the record of trial (Par. 87b, p. 77, MCM), and that requirement was fully complied with here (CM 231). Moreover, since petitioner offered no evidence to show that the officer convening the court was not empowered so to act, the respondent was not required to prove such authority, but could rely on the presumption of regularity which adheres to the acts of public officers. See *Stearns Co.* v. *United States,* 291 U. S. 54, 63; *United States* v. *Chemical Foundation,* 272 U. S. 14–15; *Nofire* v. *United States,* 164 U. S. 657, 660–661; *United States* v. *Royer,* 268 U. S. 394, 398; *Knox County* v. *Ninth National Bank,* 147 U. S. 91, 97.

CONCLUSION

For the foregoing reasons we respectfully submit that the petition for a writ of certiorari should be denied.

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